BOOK REVIEWS.

THE LAW OF ESTOPPEL. By MELVILLE M. BIGELOW, Sixth Edition. Revised by JAMES N. CARTER, Ph. B., L. M. Boston: LITTLE, BROWN & Co. 1913. pp. lxxiii, 857.

The new edition of this book brings to mind again the very creditable character of the original work. The original textbook has stood for over forty years as a monument to scholarly methods. It should represent, inferentially, a distinct protest against the hurly-burly, hasty and superficial manner of compilation which has afflicted so many textbook writers in recent years. Thoroughness has been sacrified to speed so frequently in the matter of the publication of textbooks that it is a relief to turn to a work which represents the conscientious and patient effort of a genuine student, and which has constituted a valuable contribution to the science of law.

It may be stated, in passing, that there can be no justification for the publication of a textbook unless it, to some extent, serves the purpose of exhibiting and clarifying the law as a science. This can be done only by the discovery, after painstaking investigation and search, of the fundamental principles underlying the particular topic under examination, and by the plain, unambiguous exposition of those principles when discovered. The author who, having laid bare the line of principle, hews, throughout his treatise, exactly to that line, and deals with decided cases only to expose the nearness or remoteness with which they approach that line, stopping on the way sufficiently long to point out with respect to the authorities examined, their conformity to or divergence from the principle which should have controlled them, performs the only valuable service which lies within the province of textbook writers. The collection of a heterogeneous mass of decisions relating to a subject, and the printing of them with a statement of what they hold, is not the legitimate field for textbook writing. That office is performed, and, in these days, adequately performed, by the digests. Such a compilation is not made a textbook by naming it such. When such compilation is made and misnamed a text book it does more harm than good. It is only as a textbook writer weaves into his work something of himself, his own excursion into the realm of principle, his own careful thought with regard to the incidents of the principle, his own appreciation of the reasons or the explanations underlying the adoption of the principle, and his own analysis of the decisions in the books to determine whether or not they have departed from the principle, that a textbook writer adds anything to the development of the science.

True lawyers, both those on the Bench and those off it, are constantly searching for the root principle and the controlling scientific considerations to guide them in their work. To this end they turn, and should be justified in turning, to the work of students of the law, done in calmness, deliberation, and exhaustive contemplation, in days which have been free from the hurry and stress to which they themselves are necessarily subjected. If the textbook fails adequately to answer this demand it has no excuse for being.

Put to this test, "Bigelow on Estoppel" gives gratifying results. The arrangement of the work, its disposition into subject-heads, the

treatment of the various topics, the comprehensive and clear analysis of the whole subject with which the work opens, disclose and demonstrate a scholarly disposition, a mastery of the subject, and an ability adequately to express the essential thought of the investigator. It is significant of a proper conception of his work that the author has put his summary at the beginning rather than at the end of his work. It indicates that he knew his subject before he began to write, and that he did not have to educate himself with reference to it in the process of attempting to educate others. He has avoided the temptation, to which many who have written since the time of the first edition have fallen, of contenting himself with assembling in one package unrelated and undigested chunks of information. It is to be regretted that textbook writers have not in larger numbers taken inspiration from this fine example of the scientific treatment of this important subject.

It is worthy of note that during all the years of its use the corpus of this book has stood substantially unaltered. That fact proves much as to the excellence of the original work as it was turned out by the author's mind. Such being the fact, it is obvious that a new editor and reviser could do little to detract from its merits or add to its virtues, save to bring the book, by a citation of new authorities, down to date. This task seems to have been performed in a careful and accurate manner befitting the textbook itself.

In the case of a work so excellent, reference may be had to a few instances in which, it may be suggested, the scientific method was relaxed, or where the difficulty of the subject led to inadvertences, but where improvement might be made along the author's own lines. These instances are pointed out, not at all by way of criticism, but in order if possible to emphasize the desirability of the unrelenting and thorough insistence upon scientific treatment.

Notwithstanding the phrase is an alluring one, it is unfortunate that the author chooses to call the subject-matter of his treatise "Incontestable Rights." Not only is the phrase itself a fine example of redundancy, but, much more to the point, it is misleading as a matter of the law with which he deals. There may be a contest over the facts in a particular controversy, and evidence pro and con may be adduced with reference to them; but once the facts upon which the estoppel is based are ascertained, the Right is deduced from them inevitably. Being a right, it is incontestable. It adds nothing to the description of a right to call it an incontestable right. The misleading character of the phrase consists in this, that the adjective would seem to distinguish the rights arising by estoppel from other rights, in respect of their destructibility. But there is no such distinction. A man may have a right arising under a contract actually made between himself and another, or he may have a right to recovery *as though upon a contract,* although no contract were actually made, and this because the other party may be estopped from denying the existence of the contract alleged; but of these rights one is as incontestable as the other, no more, and no less. The error is shown by a glance at the language of the author. He says, "In the case of estoppel the inference, if the facts required for it are present, is certain, or at least it is necessary by law. And thus an incontestable right is created." But the same thing is true of every conclusion of law whatsoever, and is not peculiar to the law of estoppel. The observation to be made is that no subject can be treated scientifically unless and until the language employed with reference to it is scientifically accurate.

Again it may well be questioned whether it is proper to speak of the effect of a judgment as "estoppel by record." The binding force of a judgment comes from the simple fact that a Court of competent jurisdiction in the premises, has determined a question as respects certain parties. The force of the judgment arises from the fact that the matters involved in it are res adjudicata. It would save not a little of uncertainty of reasoning and of confusion of thought to designate this kind of so-called "estoppel" as being just what it is, and eliminate it entirely from the subject of estoppel; and this, for the reason, that it cannot be co-ordinated with the other classes of so-called estoppel in any harmonious way. This idea is still further borne out by the fact which is deducible from the author's own treatment of this kind of "estoppel", that the judgment or "record" is available simply as a piece of evidence upon the trial.

As an illustration of lapses from close thinking, discernible here and there in the work, reference may be had to the treatment by the author of the effect of a judgment in an action against one of several joint contractors. He states the proposition, faithfully, that the judgment rendered in such an action may be used by one of the other joint contractors in case a subsequent action is brought against him; but he deals with this as though it were part of the doctrine of estoppel, whereas in fact it has not the remotest connection with estoppel. He does, indeed, incidentally refer in this connection to "merger"; but only after his treatment of the subject as a phase of estoppel. One might well wish that the author had been more clear in his distinction, or, better still, had eliminated from his work that which belongs outside the field of his subject. Similarly, in the author's treatment of the matter of a judgment rendered against one of several joint tort feasors, he falls into the fault, from which many decisions of the courts themselves are not free, of forcibly dragging in things which are not at all pertinent, and thus lumbering up the subject with unnecessary and immaterial considerations; and, worse still, confusing it to that extent.

Similarly, the query might justifiably be made, whether the so-called "estoppel by deed" can properly be called a separate and distinct kind of estoppel; or whether it should not in part be incorporated in the part of the treatise dealing with "estoppel *in pais*," and the other part of it distinguished clearly from any connection with the doctrine of estoppel. To put the point, perhaps, more clearly, it would be that such portion of the so-called "estoppel by deed" as consists in denying to the maker of the deed the liberty of contradicting its representations when another, having the right to act upon them, has so acted and to his injury, would simply be an application of the doctrine of "estoppel *in pais*"; and on the other hand, the rest of the field covered by the so-called "estoppel by deed", to wit: the application of estoppel to conveyances, will be seen, it is surmised, upon a close examination, to resolve itself into the proposition that as a matter of interpretation of a written document the conveyance will be construed, wherever possible, to cover the estate which was purported to be conveyed, but which at the time of such conveyance the grantor did not own. Assuming that these matters of "record" and matters of "deed" have in the decided cases been referred to as "estoppels", it is the full province of a scholar preparing a textbook not only to clarify the terminology of the subject, but more especially to differentiate the matters which are properly a part of the subject, and those which are governed by other principles. Only thus can the science be advanced.

This considered, it may be only fair to advance the statement that the only estoppel, properly and as a matter of substance so-called, is the estoppel *in pais*.

The author is not happy in his attempted distinction between what he calls "estoppel arising from taking possession", on the one hand, and what he calls "estoppel by conduct", on the other hand. The latter is a sufficiently broad designation to cover the former; and it is certain that the many cases of transactions involving commercial paper, which he cites and discusses, come clearly under the general doctrine of estoppel *in pais*—that is to say, estoppel arising upon a misrepresentation of facts—whether the misrepresentation arise by reason of "taking possession" of the note, draft, or bill, or whether it arise from other "conduct". It is not conducive to the clarity of the subject to make unnecessary distinctions, or to attempt to make them where none in reality exist.

It is an unhappy circumstance that in dealing with the most important, and perhaps, as suggested above, the only true estoppel, namely the estoppel *in pais*, the author misstates an important point of the law with regard to it, only to correct the mistake in a subsequent portion of his treatise, but after the confusion may have been created in the mind of the reader, and the injury done. He states, as the second requisite element of estoppel *in pais*, that "the representations must have been made with knowledge of the facts." This statement, it is to be observed, is a part of his general announcement of the elements of estoppel *in pais* and the law of the subject. The law is contrary. It is not necessary to create an estoppel *in pais* that the representation shall be false to the knowledge of the party who makes it. Both the weight of authority and all of the reasoning are against the proposition which he states. His later reference to the fact that there are decisions both ways and that it may be said that properly it is not necessary that the party making the representations should know that they are false, may go far in the way of atonement for the initial erroneous statement, but they do not repair the injury done.

The addition of one further instance of inadvertence by the author will suffice. He treats as part of the doctrine of estoppel two topics which have no connection with it, not even the most attenuated. These are the topics of waiver and election. One who has a condition inserted for his benefit in the obligation upon which he is bound, may, of course, waive it; and when he has waived it it is gone, and he is not estopped from setting it up as a defence. He cannot set it up as a defence because it is no longer in existence, for the reason that he has himself put an end to it. So, likewise, where a person has the alternative of selecting one or the other of two things and has once made his selection his option has been exercised, and having been exercised is at an end. It cannot be sound to say that he is prevented from exercising the option over again by an "estoppel." He cannot exercise it over again because he had but the one option, the one choice; and having made it, it is exhausted.

These references to incidents of the treatise are made, as suggested above, to indicate the general integrity of the text. Even if the instances referred to are instances of defects, it may be said truthfully that they stand out the more pointedly and the more impressively because of the contrast between them and the perfection of the rest of the text.

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